**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**
**Appeal from Order No.339 of 2007**

Mahadeo Rama Kadam
& Others ..Appellants

versus

Devidas Vithoba Kadam
& Others ..Respondents

Mr.J.Shekhar i/b. J. Shekhar & Co. for the Appellants

Mr.Surel Shah for the Respondent Nos.1 to 4.

**Coram : S.R.Sathe, J.**
**Dated : 24th August, 2007**

P.C.

1. By consent heard finally at admission stage.

2. Heard both the learned advocates. Appellant, the original plaintiff has filed the present appeal against the common order passed below Exhibit 25 and 27 whereby the appellants application to bring heirs of respondent No.4 in Civil Appeal No.137 of 2005 was rejected.

3. Plaintiff filed suit for declaration and injunction against four defendants. The original defendant No.4 Shivdas died during the pendency of the suit. So his son Sambhaji was brought on record

as his legal heir. The suit was heard on merits and it was dismissed on 16.4.2005. Being aggrieved by the same the plaintiffs filed Regular Civil Appeal No.137 of 2005. When summons of the said appeal was sent to the Respondent No.4 Sambhaji, it was reported that Sambhaji died on 23.8.2003 i.e. even during the pendency of the suit. Hence, the plaintiff filed the application Exhibit 25 for setting aside the abatement and for condonation of delay and Application Exhibit 27 for the same relief and bringing heirs of Respondent No.4 on record. The said application was opposed by the Respondents and the 4th Adhoc Additional District Judge, Solapur, rejected both the applications filed by the plaintiff. Hence, plaintiff filed the present Appeal from Order.

4. In this Appeal from Order the learned Advocate for the Plaintiff submitted that during the pendency of the suit, after the death of Sambhaji, an application was made to bring Mandodari on record. According to him she had even appeared through advocate and sought time for filing written statement. However, due to inadvertance, no order was passed on the application filed by the plaintiff

in this behalf. The learned advocate for the plaintiff, therefore, submitted that in the interest of justice, the plaintiff be allowed to bring heirs of Respondent No.4 on record.

5. The learned advocate for the defendants has strongly opposed the appeal mainly on the ground that there is no provision under Order 22 of C.P.C. whereby the Court can set aside the abatement which has taken place during the pendency of the suit. He also submitted that the present plaintiff had in fact submitted an application to the 4th Additional District Judge seeking permission to withdraw the appeal and file fresh appeal. However, it is not known as to what order has been passed on the said application. One thing is certain that if really plaintiff was aware about the death of Sambhaji while filing the present appeal, he should not have shown him as Respondent No.4. Besides this, if really Mandodari was the heir of Sambhaji and Plaintiff had taken steps to bring Mandodari on record then also he would have shown Mandodari in the present appeal as Respondent. But that has also not happened. Under the circumstances, it appears that the case of plaintiff that he had no knowledge

about Sambhaji's death is in fact not true and the same cannot be accepted. Moreover, it is well settled that the Appellate Court can pass order under Order 22 only if one of the parties to the appeal dies after the suit has been decided and during the pendency of the appeal. Here Sambhaji has died during the pendency of the suit. So, no order can be passed in the appeal under Order 22 to bring Sambhaji's heirs on record. Under the circumstances, it cannot be said that the order passed by the 4th Additional District Judge is improper or illegal. Hence, there is no need to interfere with the said order. In this view of the matter there is no substance in the Appeal from Order and the same is dismissed with costs.

**(S.R.Sathe, J.)**